U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 10 April 2017

CASE NO.: 2015-STA-00003

In the Matter of:

REED A. CULVER,
Complainant,

vs.

LARRY KING ENTERPRISES,
Respondent,

Appearances: Reed A. Culver
Self-Represented

Richard B. Eismann, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This is a whistleblower action under the Surface Transportation Assistance Act.[1] Complainant Reed Culver drove trucks for Respondent Larry King Enterprises. He alleges that Larry King terminated his employment and sabotaged his post-termination employment efforts in retaliation for his refusal to haul cargo on a schedule that would have violated federal regulations. In the Act, Congress protected transportation industry employees who refuse to drive under such circumstances. I will find, however, that Larry King Enterprises would have terminated the employment because of Complainant's insubordination even if Complainant had not engaged in protected activity. Similarly, Larry King would have made the same comment to a prospective employer. I will therefore conclude that Complainant is not entitled to a remedy under the Act.

[1] 49 U.S.C. § 31105; *see* implementing regulations at 29 C.F.R. Part 1978. In 2007, Congress amended the statute to implement the recommendations of the 9/11 Commission. P.L. No. 110-053 (Aug. 3, 2007). After the amendment, the Secretary of Labor revised the regulations in two steps: an Interim Final Rule (Aug. 31, 2010; clarified Nov. 23, 2010) and a Final Rule (July 27, 2012).

Introduction and Procedural History

Complainant initially brought this action against two respondents: Larry King Enterprises and one of its customers, Fiberon, LLC.[2] It was part of Complainant's job to deliver materials to – and on occasion drive finished product from – Fiberon's local Meridian, Idaho yard. Complainant alleged that Fiberon managers harassed him in retaliation for the same protected activity that Complainant asserts on his claim against Larry King.[3]

Fiberon moved for summary decision on March 5, 2015. I took oral argument and then denied the motion from the bench. I stated my reasons for the record and followed-up with a written order. *See* transcript, June 1, 2015; Order, June 5, 2015.[4] Fiberon timely moved for reconsideration. It argued that I had erroneously relied on the current regulations (the "Final Rule") when the conduct in question occurred before those regulations had been published.

Under the earlier Interim Final Rule that was in effect at the times relevant here, the regulatory prohibition of harassment applied to "employers." A revision in the Final Rule (published after the conduct here) extended the prohibition to "any person." *Compare* 29 C.F.R. § 1978.102(c)(1)(i) (Aug. 31, 2010 and July 27, 2012.) I concluded that the revision was not merely procedural or a clarification; rather, it imposed new obligations on companies like Fiberon, which did not employ Complainant but was essentially a customer of Complainant's employer. It therefore was improper to apply retrospectively to a customer such as Fiberon the revised regulation concerning harassment.[5] Accordingly, I granted on reconsideration Fiberon's motion for summary decision. Order, Nov. 6, 2015.

On May 23 and 24, 2016, the matter went to hearing in Boise, Idaho on the remaining claim against Larry King Enterprises. Complainant's counsel had withdrawn, and Complainant represented himself. Larry King Enterprises was represented by counsel of record. Complainant testified on his own behalf and called as witnesses his mother Janine Culver; his domestic partner Maria Reyes; and another of Respondent's former truck drivers, Scott Hutchens. Respondent called its co-owners, Larry King and his wife, Diane King; Fiberon customer service manager Jerry Love;[6] Fiberon materials manager Edgel Jefferies; [7] and Fiberon shipping lead Craig Van Kleek.[8] I accepted several stipulations[9] and admitted numerous exhibits.[10]

---

[2] Technically, Fiberon's connection to Larry King Enterprises was once removed. Rather than contract directly with Larry King, Fiberon worked with a broker (C.H. Robinson), that assigned Fiberon work to trucking companies, including Larry King. R.Ex. K at 14. But under this arrangement, Fiberon managers worked directly with Larry King Enterprises and its employees, giving them work assignments and instructions at the Fiberon yard.

[3] Complainant did not contend that Fiberon communicated with Larry King about the termination of Complainant's employment or in any way was involved in Larry King's decision to terminate the employment.

[4] I issued a short written order on June 5, 2015, confirming that the motion had been denied for the reasons stated on the record at the hearing on the motion.

[5] Neither the statute nor the revised regulation provided expressly for retrospective application.

[6] Love's job duties included receiving customer orders, entering orders into Fiberon's computer system, and maintaining inventory levels at Home Depot Distribution Centers in the western United States. Transcript of Hearing ("Tr.") 265. He also scheduled the production of material made at the Fiberon facility. *Id.*

Findings of Fact

Larry and Diane King[11] together own Respondent Larry King Enterprises, a trucking company in Nampa, Idaho. Tr. 125. Respondent is a relatively small business. At the time of trial, it had three trucks, six trailers, and three employees. Tr. 350.

About 80 to 90 percent of Respondent's profits at the time came from work done for Fiberon. Tr. 373. Fiberon makes decking and fencing from sawdust. R.Ex. K at 15. It contracts its trucking needs to C.H. Robinson, a kind of trucking broker. R.Ex. K at 14. C.H. Robinson hired Larry King on the Fiberon account. R.Ex. K at 11. Though C.H. Robinson paid Larry King for the work, Larry King generally took day-to-day instruction from Fiberon materials manager Jeffries. Tr. 283–84, 392–93, 404.

The primary service Respondent provided to Fiberon was to deliver sawdust from various local woodgrain mills to Fiberon's facility in Meridian, Idaho. R.Ex. K at 14; Tr. 56–57. Respondent collected the sawdust from large storage bins at mills in Fruitland and Nampa, Idaho. Tr. 55–56. If Respondent's drivers didn't maintain a sufficient pace, the sawdust bins would overflow, causing spills that would have to be cleaned with shovels. Tr. 57.

Respondent hired Complainant as a temporary driver in August or September 2009, doing local hauls. R.Ex. K at 11; Tr. 351. Sometime in 2010, Larry King asked Complainant to begin hauling loads to more distant locations, referred to as "out-of-town hauls" or "long-hauls," and Complainant agreed to the work. Tr. 139–40. As time went on, Larry King gave Complainant long-hauls more frequently, while another driver, Scott Hutchens, handled an increasing portion of the local sawdust deliveries to Fiberon's plant. Tr. 142. The long-hauls typically were deliveries of finished Fiberon goods to retailers such as Home Depot. Tr. 145–46; R.Ex. K at 20.

---

[7] As materials manager, Jeffries was responsible for purchasing raw materials and scheduling the delivery of materials to and from the plant. Tr. 283. He also managed the shipping department, which required him to ensure that trucks entered and exited the plant as needed. Tr. 284.

[8] When asked to describe his job duties, Van Kleek explained, "I post all shipments, I create shipments, I line out the shipping department and basically I'm responsible for everything that happens out there." Tr. 314. His job also included loading trucks. Tr. 314.

[9] Respondent stipulated that (1) it is covered by the Act; (2) at the relevant times, Complainant was an employee of Respondent; and (3) Respondent terminated the employment. Tr. 6–8.

[10] I admitted Complainant's Exhibits ("C.Ex.") P-1 through P-7, R-1 through R-8, and L-1 through L-15. Tr. 13, 262. I admitted Respondent's Exhibits ("R.Ex.") A through K. I admitted R.Ex. L, excluding pages 24–25, 27, and 29–30. Tr. 10–21, 32. I admitted R.Ex. M through R. Tr. 32. I admitted R.Ex. S, excluding pages 10–14. Tr. 25–26, 32. I admitted R.Ex. T through U. Tr. 32–33. I admitted page one of R.Ex. V, but excluded the remainder of that exhibit. I admitted R.Ex. W, excluding pages 13–15. Tr. 31–32. I admitted R.Ex. X-1, W-2, X-3 and X-4. Tr. 33, 35.

[11] Throughout this Decision and Order, I refer to most individuals by surname. To avoid confusion, I make exceptions for Larry King and Diane King, to whom I refer by their full names because they share the same surname.

Larry King personally did not like the long-hauls. Tr. 358–59. He explained that his company earned more money per mile hauling sawdust locally than competing "on the road" "against all these big companies." Tr. 355. As he said, "I have a niche that I take care of and that niche pays me better. I've been doing it, I know what I'm doing, I have the proper equipment. Out on the highway, I compete with many, many people. On the sawdust hauls, not so much." Tr. 355. Nevertheless, Larry King took the long-hauls to bring in revenue when his trucks were not occupied with the sawdust work. Tr. 354.

Complainant's protected activities came out of the long-haul jobs. As Complainant explained – and Respondent did not dispute – the Federal Motor Carrier Safety Administration regulations allow truckers to work a maximum of 14 hours before they must take a ten-hour break. R.Ex. K at 19; Tr. 147. The 14-hour limit includes a maximum of 11 hours driving, plus three hours of other work, such as securing loads for transport. R.Ex. K at 19; Tr. 147.[12] The Federal Motor Carrier Safety Administration also requires truckers to take certain breaks during their shifts. Tr. 230; *see also* R.Ex. T at 9–10.

Complainant found that sometimes he could not complete the long-haul deliveries within the regulatory limits. The problem often was more the scheduled delivery time than the driving time. Complainant would begin a long-haul by driving a Larry King truck to the Fiberon yard and getting the correct trailer coupled for delivery of finished Fiberon product. Tr. 143. This took about two hours. Tr. 143; R.Ex. K at 15. It was a ten-hour drive to Kent, Washington. Tr. 144–45. If Complainant left Fiberon at 2:00 p.m., he would arrive around 12:30 a.m., assuming two short breaks and no lunch. Tr. 145.

If he could have delivered the Fiberon goods when he arrived in Kent, he would have finished within the 14-hour limit (with no more than 11 hours of driving). The problem was that the delivery usually wasn't scheduled until 7:00 a.m.[13] Tr. 145. The 6 1/2 hour wait for the delivery would put Complainant well-beyond the limit of 14 hours of work and require that he take a 10-hour break. But with the delivery scheduled 6 1/2 hours later, there wasn't time for a ten-hour break. *Id.* Complainant's solution was to park near the delivery site until it was time for the delivery, briefly violate the regulations by dropping off the load when he should be on break, and then waiting until ten hours had passed since his arrival, thus creating the impression that he had taken a ten-hour break. Tr. 145–46. After that, he'd return to Idaho. *Id.*

Complicating this was that Complainant often had to make some other deliveries in Kent during the time that was supposed to be taking the ten-hour rest period. Complainant would omit these deliveries from his logs, making the log books "a big lie". Tr. 146, 152–53. *See also* Tr. 230; R.Ex. A-1. The other driver, Scott Hutchens, testified that he also had to omit hours from his logs to avoid documenting violations of safety regulations. Tr. 38.

Complainant testified that he called Larry King and told him each time he had to work illegal hours. Tr. 253. As he said, "If I had to take time out of my log, [Larry King] knew about it." Tr. 253. Larry King denied this. Tr. 405. But I need not resolve the dispute, for it is undisputed

[12] Larry King added that truckers can work for up to 16 hours in inclement weather. Tr. 405.

[13] I have adjusted for the change in time zone.

that, as I discuss below, Complainant eventually told Larry King that he could not make these long-haul deliveries consistent with federal regulation and that he would no longer do them. That is the protected activity that Complainant is asserting. I turn to those events.

By the summer of 2011 (nearly a year after Complainant started doing the long-haul runs), Larry King felt that Complainant seemed unhappy and had begun "grumbling" about being unable to "do exactly as he wanted to do sometimes." Tr. 351–52. Larry King thought the long-hauls were part of the problem. Tr. 352–53.

Two events in particular seem to escalate Complainant's concerns about the regulatory violations. Tr. 150. First, around September 2011, Home Depot began requiring truckers to sign a log documenting the time of their deliveries. Tr. 146. Complainant realized that signing the log would prove he was working before completion of his mandatory ten-hour break. Tr. 146. Second, on one occasion—it is unclear exactly when—Complainant was forced to enter a weigh station while his logs falsely showed that he had unloaded a delivery, fueled, and driven about 20 miles in 15 minutes—something clearly not possible. Tr. 150. Fortunately for Complainant, his logs were not inspected that day, but he considered the incident "a total game changer, because [his commercial driver's license] was on the line." Tr. 150.

Later than month (September 2011) or the next month, Larry King asked Complainant to deliver a Fiberon load to Portland, Oregon. Tr. 146. Fiberon loaded Complainant's truck so late in the day that Complainant would not have had time to make the delivery at the scheduled time if he took a ten-hour break after reaching his destination. Tr. 146. Complainant decided not to take the load and began unhooking the trailer from his truck while still in the Fiberon yard. Tr. 146.

Fiberon notified Larry King that Complainant was unhooking the trailer, and Larry King came to the Fiberon yard. Tr. 146. Complainant met with Larry King, Edgel Jeffries (Fiberon's materials manager), and Jerry Love (Fiberon's customer service manager).[14] Tr. 146, 149, 302. Complainant explained that he could only do hauls when he had time to finish within the legally permitted time, or he must be given a ten-hour break during the haul. Tr. 146.

Larry King and Complainant disagreed about the specifics of how the ten-hour break requirement functions,[15] Tr. 146, but Larry King asked Fiberon to reschedule the trip so Complainant would have the time he believed he needed to make the delivery consistent with the regulations. Tr. 147. Although this addressed his concern directly, Complainant felt that the meeting upset Jeffries. Tr. 147–48.[16]

[14] Jeffries believed Van Kleek was also present. Tr. 302. It makes no different to the outcome of the case.

[15] Larry King believed that, once a driver had worked 14 hours, he could continue to operate the truck, so long as he did not drive on public roads. Tr. 402–03. I conclude, however, that this does not affect the result because Complainant subjectively believed that he could not work after 14 hours and that – right or wrong – his belief was objectively reasonable.

[16] The long-haul deliveries were seasonal, typically from about May to November each year. Tr. 245. As the end of the season was approaching, there were only a couple more long-hauls for Larry King before stopping them that year for the winter. Tr. 148. But it seems that Complainant might have violated federal safety regulations at least one more time in 2011. On November 14, 2011, he logged 10.25 hours of driving and four hours of other, non-driving work, bringing his total to 14.25 hours of work for the day—0.25 hours over the limit. R.Ex. A at 2.

The long-hauls stopped during the winter months. About seven months later, a second incident occurred when Larry King asked Complainant to resume the long-hauls runs. Tr. 149–50. On April 30, 2012, Larry King assigned Complainant a long-haul to Kent, Washington. Complainant asked Larry King to turn down the load because Complainant could not deliver it as scheduled without violating the regulations. R.Ex. K at 24. Larry King acceded and turned down the load. R.Ex. K at 24. He imposed no discipline against Complainant then or at any time prior to the termination. R.Ex. K at 24.

Complainant explained that, when Larry King turned down the load, C.H. Robinson would have assigned it to another trucking company. R.Ex. K at 24. But Complainant felt that the delay while C.H. Robinson reassigned the work would upset Jeffries. R.Ex. K at 24. He explained that, because Jeffries was "conveniently getting all loads there in a hurry, that means he's making the company money. That's good for him. Then all of a sudden when he's not, that makes him look not so good." R.Ex. K at 24.

I reject Complainant's opinion. There is no evidence of how long the delay was or how Jeffries reacted at the time. There is no evidence of how Jeffries' job performance is evaluated or what information is sent to his superiors about any delays. Complainant's opinion is no more than conjecture and speculation.

On the next day (May 1, 2012), Larry King met Complainant at the Fiberon plant.[17] Tr. 156. According to Complainant, Larry King tried to convince him that he did not need ten-hour layovers. Tr. 156. Complainant continued to disagree, and the two of them "basically had a stalemate on that . . . ." Tr. 156.

Complainant asserts that, immediately after this meeting, he began getting delayed at the Fiberon yard, having to wait for other trucks to move out of his way before he could unload sawdust. Tr. 157. He claimed he had not experienced any significant holdups before then. C.Ex. R-2. He was unsure whether Larry King had anything to do with the holdups. Tr. 185. As he testified,

> It just seems odd that [Larry King] comes down and talks to me a[t] the plant on May the 1st, and is trying to get me [to] do these out-of-town loads. And I tell him no, and explain to him the rules why I can't. And then the very next load I'm held up and that's when [the holdups] started.

Complainant explained that, even after omitting certain time from his daily log, he had still exceeded the limit. Tr. 153. The Department of Transportation noted the violation in audit of Larry King. Tr. 153, 408.

[17] It is unclear who was present at the meeting. Complainant testified at the hearing that Jeffries was not present. Tr. 157. But in an unsigned and undated declaration, Complainant stated that Jeffries was present. C.Ex. R-2–R3. I accept Complainant's hearing testimony that Jeffries was not at the meeting. I infer that Complainant wrote the declaration closer in time to the event he describes. But, as the declaration is undated and no one testified about when it was written, I cannot know how much closer in time it was to the meeting in the Fiberon yard. The fact that Complainant did not sign the declaration detracts heavily from the weight I assign the statements in it. As the hearing testimony was under oath, I give it more weight than the unsigned, undated declaration.

Tr. 185. Complainant was convinced, however, that Jefferies intentionally was causing the holdups. R.Ex. K at 25. He believed that it was part of Jefferies' job as the shipping manager to tell drivers where to put their trucks and that Jeffries could have directed the other drivers to make room for him to pass. Tr. 186. Complainant contended he was held up at the Fiberon yard on 18 occasions during May 2012. Tr. 186; L-1–L-14. He believed Jefferies was involved every time. Tr. 185–86.

Complainant documented the holdups in his daily logs. Tr. 158; C.Ex. L-1–L-14. Respondent introduced summaries of the time Complainant spent in the Fiberon yard during April and May 2012, R.Ex. J at 1–2, presumably to show that the delays in May were not retaliatory because there were also delays in April that occurred before Complainant refused the load on April 30, 2012.

The logs and the summary demonstrate that Complainant overstated the history when he said there had been *no* significant delays before May 2012. But the logs and summaries also demonstrate a substantial *increase* in delays starting in May 2012.

Respondent cited nine entries in April 2012 for which Complainant spent 3/4 hour or more in the Fiberon yard (excluding one occasion on which Complainant was delayed for two hours because of a flat tire). By selecting 3/4 hour as a delay worth noting, Respondent implicitly conceded that a delay this long is significant.[18]

Looking at the May 2012 logs, there were 19 instances where Complainant spent 3/4 hour or more in the Fiberon yard during May 2012. That is more than twice as many delays after Complainant refused the long-haul load than there were in the month before. The increase is even more dramatic when comparing longer delays. Complainant spent an hour or more in the Fiberon yard only twice in April 2012 (excluding the two-hour delay for a flat tire), but spent an hour or more in the yard on 11 occasions in May 2012, making more than 5 times as many of these longer delays. The summaries show Complainant made an equal number of trips to Fiberon in April and May: 39 trips during each of those months. R.Ex. J at 1–2. Thus, the large increase in significant delays after Complainant refused to operate the truck on the long-haul job cannot be explained as any result of his coming more often to the Fiberon yard in May than April.

Fiberon contends that the increase was from increased truck activity in its yard in May. The figures show that 122 trucks exited the Fiberon yard in May 2012, while only 98 exited in April 2012. R.Ex. V at 1; Tr. 277.[19] Jefferies opined that the volume of trucks during May 2012 caused significant waiting times for trucks being loaded. Tr. 306.

[18] When he reviewed the logs, Complainant noted some waits shorter than 3/4 hour as delays, and there were some of 3/4 hour or longer that he did not note as delays. *See* C.Ex. L-1–L14; R.Ex. J at 2. It is unclear what criteria Complainant used to determine whether a holdup had occurred. It appears that Complainant considered at least some factors other than the length of the wait. But I hold Larry King to its implicit admission that a 3/4-hour wait is significant.

[19] There were also slightly fewer "less than truckload" shipments made in April compared to May, 2012 (87 in April compared to 96 in May), which were tallied separately. R.Ex. V at 1; Tr. 268–69. Sometimes multiple "less than truckload" shipments are loaded on the same truck, so it is impossible to tell from R.Ex. V at 1 exactly how many trucks entered the Fiberon yard during each month of 2012. Tr. 277–79.

I am unconvinced. Jeffries estimated that 122 trucks during the month of May worked out to five or six trucks per day, in addition to raw materials being delivered. Tr. 306. That is correct if the yard was closed on weekends. Jeffries said that up to four trucks could be loaded simultaneously. Tr. 290. Van Kleek, who was involved in loading the trucks as much as Jeffries, said that five or six trucks could be loaded simultaneously, although he had never seen more than three or four being loaded at once. Tr. 324–25. Jeffries conceded that it took only 15 to 20 minutes to load a typical truck. Tr. 290. Given that (1) Fiberon personnel were unloading only five or six trucks in an entire day, (2) it took only 15 or 20 minutes to unload a truck, and (3) there was room to unload at least four (if not five or six) in the yard at once, it should have been very seldom that other trucks would have blocked Complainant in the Fiberon yard more than 15 or 20 minutes on any occasion in May 2012. The increase Fiberon experienced in May 2012 to about five or six trucks per day does not explain a large increase the long holdups Complainant experienced that month.

Complainant submitted photographs he took during some of the holdups. C.Ex. P-2–P-5. Commenting on the photos, Scott Hutchens observed that several trucks were blocking Complainant's path through the yard, despite there being vacant loading areas into which those trucks could have been moved to open a path for Complainant. Tr. 43–53. Hutchens also noted idle forklifts, which he said indicated that the yard was not busy, again meaning that these other trucks could have been moved. Tr. 47, 49, 53. Fiberon shipping lead Van Kleek agreed that Complainant's photographs show an occasion when a truck being loaded blocked Complainant while there was a vacant loading area nearby, where the other truck could have been positioned out of Complainant's way.[20] Tr. 314, 330–31, 335.

Van Kleek testified that he had a good view of the loading area from his usual work station and said he was "pretty aware of all things happening in that area." Tr. 324. He said he always cleared paths for trucks if they had been waiting five or ten minutes. Tr. 317. He added that he absolutely would want to act if a truck had been waiting an hour. Tr. 317. In his experience, trucks could easily be moved to clear a path. Tr. 317. Van Kleek specifically recalled clearing a path for Complainant. Tr. 318. He said Complainant had to pass through a busy section of the yard, so it was common for Van Kleek to ask another truck to move out of Complainant's way. Tr. 318.

Van Kleek was unaware of anyone intentionally blocking Complainant's way, and he could not recall Complainant's having any unusually lengthy holdups. Tr. 319, 332–33. He thought it should take Complainant 35 to 45 minutes to unload a sawdust truck – only 20 to 30 minutes if he was just dropping off a loaded trailer and attaching a new one. Tr. 320–21. He thought Complainant never should have been delayed more than 30 minutes, which is how long it would

[20] The photos Van Kleek reviewed point to a single incident. They appear to have been taken on the same day. Tr. 334–35. The photograph labeled C.Ex. P-2 features a truck, and the photograph labeled C.Ex. P-5 features a trailer. Tr. 334–35. Complainant acknowledged that the truck and trailer were linked. Tr. 334–35. Thus, the two photographs were taken on the same day and show the same hold-up.

take to load any truck that was blocking Complainant, but Van Kleek added that he generally would have moved the truck out of the way before 30 minutes had run. Tr. 339.[21]

Complainant's daily logs and Respondent's summaries of Complainant's time in the Fiberon yard during April and May 2012 show Complainant sometimes spent as little as 15 minutes in the Fiberon yard. C.Ex. L-1–L-14; R.Ex. J at 2. I infer that under optimal conditions, he could accomplish his duties in that amount of time. As the time was often considerably longer, and much more frequently after he declined to do the long-haul drive on April 30, 2012, this is substantial evidence that someone at Fiberon was either intentionally delaying him or was acting in conscious disregard of his Complainant's being held up. The delays were of significant length, longer that Van Kleek would have allowed them to go on had he known of them.

Jeffries acknowledged there were instances when Complainant was delayed in the Fiberon yard, Tr. 295–96, but he denied intentionally causing the delays. Tr. 303, 305. He viewed the delays as an ordinary result of Fiberon's operations: Sometimes trucks block the path Complainant would use. Tr. 290, 303.

On this point, I find Jeffries less than credible.[22] His testimony suggests relatively chaotic conditions in the Fiberon yard. The description cannot be squared with Van Kleek's. It cannot explain the substantially lesser number of delays that occurred before April 30, 2012, than after

[21] Complainant emphasized that he had a good working relationship with Van Kleek. R.Ex. K at 19. He explained, "I have no complaint against [Van Kleek] whatsoever. [Van Kleek] was very, very professional. He's doing what he can do at the job there that he does—and he really tries hard." R.Ex. K at 19. Complainant claimed he had never been held up by Van Kleek. R.Ex. K at 25. He thought all of the holdups had been caused by Jeffries. R.Ex. K at 25.

[22] Jeffries was more credible when testifying on a different question. Complainant argues that Jeffries' presence in the yard (operating a forklift) in May 2012 was so suspicious as to suggest that he was really there to be sure Complainant was delayed. Reviewing the photos Complainant took on one delay, Hutchens identified Jeffries on a forklift. Tr. 61; C.Ex. P-2, P-4–P-5. Hutchins thought it unusual to find Jeffries on a forklift, given that Jeffries was the boss. Tr. 76. Complainant concurred, stating that in the about three years he drove for Respondent, he saw Jeffries operate a forklift only about three times before the holdups started. Tr. 157.

Jeffries testified to the contrary. He said that during 2012, he operated forklifts in the yard two or three times per day. Tr. 291-92. He said there were, at most, four forklift drivers: himself, Van Kleek, and two seasonal workers. Tr. 292–93. During the off season, he and Van Kleek were the only forklift drivers. Tr. 294. Van Kleek corroborated Jeffries' testimony, stating that it was not unusual for Jeffries to operate a forklift. Tr. 319–20. He explained that loading trucks was a part of Jeffries's job. Tr. 319–20.

As a Fiberon employee who was daily involved with shipping, Van Kleek would know better than Complainant and Hutchens how often Jeffries operated a forklift at this time. I see no sign of bias in Van Kleek's other testimony, and Complainant did not believe Van Kleek was retaliating against him.

I credit Van Kleek's observation that it was not unusual for Jeffries to work in the yard loading trucks, including by operating forklifts. I therefore accept as well Jeffries' testimony on this issue. I decline to construe Jeffries' operating a forklift as evidence of intent to delay Complainant. That does not, however, alter the findings I recited in the text above that Jeffries in fact was involved in delaying Complainant.

Having made this finding for purposes of this case, I acknowledge that the finding is not binding on Fiberon. I dismissed Fiberon on summary decision. Fiberon did not have an opportunity to present evidence during the hearing and was not given an opportunity to cross-examine witnesses or offer argument. Had Fiberon participated as a party at the hearing, my findings might have differed.

that date. I find, more likely than not, that Jeffries or others acting under his supervision intentionally (or acting in conscious disregard) were delaying Complainant's deliveries starting at the beginning of May 2012, directly on the heels of Complainant's refusal of the long-haul job on April 30, 2012.[23]

Around May 16, 2012, Complainant and Larry King spoke to a mechanic about the adequacy of an aftermarket turbocharger Larry King had installed on Complainant's truck. Tr. 409–10; R.Ex. K at 33–34. Complainant had recently taken the truck down a steep grade in Oregon, and the truck's compression release engine brake (sometimes called a Jake brake) would not hold, so Complainant "took a pretty good ride off the hill." Tr. 161. Complainant recalled, "Every brake on my truck got hot. It was somewhat of a safety thing." *Id*.

When Complainant got back to Idaho, he and Larry King spoke with a mechanic, and Complainant claimed he overheard the mechanic say that it is fairly common for aftermarket turbochargers to provide an inadequate air supply for the compression brake to work correctly. Tr. 162. According to Complainant, Larry King responded by asking, "Can't [Complainant] just go down the hill slower?" Tr. 162. The Mechanic replied, "Well, I guess he can." Tr. 162.

After meeting with the mechanic on May 16, 2012, Complainant told Larry King he would rather not do long-hauls. Tr. 162–63. In addition to his concerns about the legality of the loads, Complainant did not feel comfortable driving the truck down the same steep incline, given his recent trouble with the compression brake. Tr. 162–63. He told Larry King, "Look, have somebody else drive this truck and I'll just haul sawdust." Tr. 163, 358. Larry King acquiesced and stopped sending Complainant on long-haul runs. Tr. 163; *see also* C.Ex. L-8–L-14.

Meanwhile, the holdups in the Fiberon yard continued. Complainant never complained about the holdups to anyone at Fiberon, including Jeffries. Tr. 160, 198. But he did complain to Larry King. Tr. 160. He called Larry King to let him know when he was being held up. Tr. 194. He hoped Larry King would ask Fiberon to quit delaying him. Tr. 196. He explained, "What was going on here was unneeded. There was no need for the hold-ups. There was no need for any of it. It was purposeful harassment. And so what I was hoping is that Larry would say—look, we've done this long enough, [Jefferies], we need to stop." Tr. 199. Instead, Larry King told Complainant, "Just be patient and sit there." Tr. 196.

Larry King never complained to Complainant about the holdups, and Complainant never thought Larry King held him personally responsible for them. Tr. 196–97, 382. Complainant was paid by the hour, so he was compensated for his waiting time during delays. Tr. 196. Despite the lack of any pressure from Larry King, Complainant was concerned that he would be fired. Tr. 182. He believed that "anytime [] Jefferies gets it in for anybody at Fiberon, you're fired . . . ." Tr. 182. Complainant was also skeptical that Larry King was truly okay with his truck sitting idle during the holdups because it cost Larry King money. Tr. 185.

[23] Jeffries also opined that holdups occurred because the scale created a bottleneck in the yard. Tr. 296. Yet he conceded that weighing a truck generally takes only about five minutes. Tr. 296. Even when there is a problem, it takes only ten to 15 minutes. Tr. 296. The time involved is too little to explain the frequent long delays that Complainant experienced in May 2012, given that there were only five or six trucks at the Fiberon yard per day in that month.

Larry King acknowledged that, initially, he took no action in response to Complainant's complaints of holdups. Tr. 356. He thought Complainant was "being oversensitive and it was his attitude that made him believe that he was being held up." Tr. 356.

Larry King told Complainant not to talk to Fiberon directly about the holdups unless it was absolutely necessary. Tr. 381. He was concerned that Complainant might jeopardize Larry King Enterprise's business with Fiberon if he complained. Tr. 381. Testifying at the hearing, Larry King said, "[Fiberon] is my bread and butter, okay. They have a business to do on their own and they know they have to receive the sawdust. They're not going to block me out for very long. If they did that on a continuous basis, they would run out of sawdust." Tr. 381. So Larry King told Complainant to "just let some of this run off of his back, don't worry about it, take your turn, and to call me if he was delayed [f]or too long of a period." Tr. 381. As Larry King testified:

> My plan was that if we just keep our noses clean, [Complainant] will get in a better mood and he won't be saying that he's detained anymore. We just need to be patient, we'll work through this, it will all calm down, get under control. I'm not going to send him out of town anymore, I think that he's upset about that. We just needed to let things calm down.

Tr. 382.

In mid- to late-May, 2012, Complainant began telling Larry King that Jeffries was responsible for the holdups. Tr. 357. Larry King did "[a]bsolutely not" think Jeffries was intentionally delaying Complainant. Tr. 382. Nevertheless, Complainant started asking Larry King to get the trucks out of his way. Tr. 357. Larry King started making phone calls to Fiberon during holdups. Tr. 358. On one particular occasion when Complaint called Larry King to complain of a holdup, Larry King first called Jeffries, but Jeffries did not answer. Tr. 358. Complainant, who was waiting in the Fiberon yard at the time, claimed he saw Jeffries take his phone out of his pocket, look at it, and then put it back in his pocket without answering. Tr. 209. Larry King then called Van Kleek, who said he would handle the problem. Tr. 358.

Complainant's frustration with the holdups came to a head on June 1, 2012. That day, Complainant told Larry King that he should take some action to end the holdups, which Complainant viewed as harassment. Tr. 165, 362. He explained to Larry King that there was no legitimate reason for the holdups. Tr. 165. Complainant told Larry King that he had been documenting the holdups in his daily logs and with photographs. *Id*.

Complainant testified that, when he told Larry King about the photographs, Larry King "freaked out."[24] *Id*. Complainant concluded that Larry King "didn't want those pictures going anywhere." *Id*. Nonetheless, Complainant pressed the issue, asking Larry King: "How would [Jefferies] feel if I sent [the photos] to [Fiberon's headquarters in] North Carolina?" *Id*. Larry

[24] Complainant's mention of the photos could not have been entirely a surprise to Larry King. In mid-May 2012, Van Kleek had asked Larry King why Complainant had been taking a lot of pictures. Tr. 355. At the time, Larry King didn't say anything to Complainant. As he testified: "I chose to let that go, maybe it's just a phase, maybe it will go away." Tr. 415.

King told him not to do that. *Id*. Complainant admitted at trial that it probably was not "real smart on my part" to play off Larry King's fears like that. *Id*.

Later that day, Complainant sent a text to Larry King with a photo from one of the holdups at Fiberon and the text reading: "Going to N.C."[25] Tr. 165, 206–07, 360; R.Ex. P. Larry King understood this to mean that Complainant had sent the text to Fiberon headquarters. Tr. 363. He became "a little distraught, somewhat agitated . . . ." Tr. 363. He was afraid that Complainant's sending the photo would negatively affect his business with Fiberon. Tr. 373. He "figured that there would be repercussions up to and endangering my livelihood, my trucks, my investment and my job, income, and I would lose my contract, because I have an employee that is stirring a hornets' nest to corporate Fiberon." Tr. 373.

As Larry King explained, "Larry King Enterprises is represented by [Complainant] in that yard. If [Complainant] is causing conflict or creating issues by taking pictures, trying to get Fiberon employees in trouble, or trying to change their procedures, that's probably going to reflect bad on me." Tr. 412. He elaborated, "It's not the picture, itself. It's the idea of a Larry King employee sending a picture to corporate Fiberon, of a truck in the yard, with whatever verbiage you would also send with that." Tr. 412.

Fiberon has the right to terminate its relationship with Respondent at any time for any reason. Tr. 389. Deliveries on behalf of Fiberon make up about 80 to 90 percent of Respondent's business, and Larry King explained that he has no other significant business opportunities available to him because he is in a very niche market. Tr. 373–74. He was not aware of any other work that would use his expertise and equipment. Tr. 374. If he lost the Fiberon work, he would probably have to sell what equipment he could and work as a truck driver until he retired. *Id*. He could not maintain the business without Fiberon as a customer. Tr. 376–77.

After receiving the text, Larry King called Complainant and said, "'I'm sick and tired of it. I want you to go clean your truck out and go home. You're done here,' something in that verbiage." Tr. 363–64. By saying this, Larry King meant that he was firing Complainant. Tr. 364.

Complainant remembered the conversation slightly differently, recalling Larry King as saying something along the lines of, "You need to find something else to do." Tr. 216. For whatever reason, Complainant considered that to mean he had been laid off rather than fired. Tr. 219. In any event, Complainant never worked again for Larry King or Larry King Enterprises after that day.

[25] Complainant expressed some uncertainty about whether he actually sent the text message to Larry King. Tr. 165–66, 207–08. He explained that he initially thought he had sent the text, but much later, after he had filed a complaint with OSHA, he found a copy of the text saved on his phone as a draft. Tr. 208. That caused him to question whether the text had been sent. Tr. 208. Complainant's questions notwithstanding, the evidence shows that the text was sent from Complainant and received by Larry King. A copy of the text that Respondent produced from the one Larry King received includes the computer-generated message: "This message was sent using the Picture and Video Messaging service from Verizon Wireless!" R.Ex. P. Larry King credibly testified that he received the text. Tr. 363.

Curiously, Complainant never actually sent the photographs to North Carolina. Tr. 213. He candidly acknowledged that sending the pictures would have hurt Larry King, which he testified he did not intend to do. Tr. 213. What borders on the inexplicable, however, is that Complainant had multiple conversations with Larry King later that afternoon and never told him that he did not send the photos to North Carolina. *Id*.

In particular, after the phone call announcing the termination (or lay off), Larry King met Complainant in Fruitland, Idaho. Tr. 364–65. Complaint cleaned out his truck and Larry King asked him for his company credit card, which Complainant gave him. Tr. 218–19, 365. They both were agitated. Tr. 365. Larry King felt betrayed and was upset that Complainant had sent the photos. *Id*. He testified that, when Complainant asked why he was being fired, Larry King said it was because of his attitude. Tr. 366. But Complainant said that Larry King did not explain why he was fired. Tr. 218. Larry King clarified at trial that he had fired Complainant because of:

> His poor attitude, he was threatening my livelihood by stirring that hornets' nest up, by sending text and pictures to North Carolina, which, after the fact, I found that he did not send, but at that point I thought he did send. He had a very poor attitude, becoming very difficult to work with. In my opinion, it was time for him to go.

Tr. 371. Larry King recalled Complainant also asked whether he could collect unemployment benefits, and Larry King said he couldn't care less. Tr. 366. Once Complainant cleaned out the truck and left, Larry King returned to work. Tr. 367.

Later that afternoon, Larry and Diane King called Complainant. Tr. 368. Diane King asked about the hours Complainant had worked so they could pay him. Tr. 216, 368. Complainant said he was busy taking care of his father's memorial and did not have time to talk right then. Tr. 216, 369. According to Complainant, Larry King said, "You've been a good employee. I'll give you your unemployment. But this has to stop right now." Tr. 216. Complainant testified that he took this to mean that Larry King was offering him unemployment benefits in exchange for not sending the photographs.[26] Tr. 216.

With one exception, Larry King Enterprises stopped the long-haul jobs after this. Tr. 380. Larry King explained,

> I don't do them. I stay away from them. I'm not set up for them. They're extra work and inconsistent. I choose to do what I'm familiar with and that is haul chips. I have a routine, I like that, I don't have any issues with hours or with maintenance. If there's something needs to be fixed, we're local. It works better for me. I'm not set up as a coast-to-coast guy or even a west coast guy. I am set up as a local trucking company.

Tr. 380.

[26] Maria Reyes overheard some of this conversation. Tr. 104.

Post-termination efforts to find employment. Complainant had difficulty finding work after Respondent terminated him. Tr. 168. He believes that Larry King interfered with his job search. Tr. 168. He testified that he submitted over 500 job applications but received only about a half dozen interviews. Tr. 169. He submitted documents related to his job search, including his resume, certification that he passed the State of Oregon's contractor's licensing test, a log of just over 100 jobs to which he applied (not the 500 to which he testified),[27] and e-mail (apparently automated) responses related to online job applications. C.Ex. L-15. He recalled instances that made him suspect that Larry King had interfered with his job search.

Heinz. First, Complainant received an interview at Heinz, where he had worked in the past. Tr. 169. At one point, Complainant's three interviewers asked him to leave the room, and Complainant overhead a heated debate. Tr. 169–70. When he returned, only one interviewer was present and said that the other two had "won" and that he could proceed to the next step, which was a physical evaluation. Tr. 169–70. When Complainant reported for the physical, his blood pressure was above the acceptable range. Tr. 170.

Complainant left and got a note from his doctor saying that his blood pressure rises during testing because he gets nervous, which Complainant gave to a nurse at Heinz. Tr. 170. Someone from Heinz' human resources department told Complainant he had to wait 90 days before retesting. Tr. 170–71. Complainant later ran into a Heinz plant manager and mentioned the situation to him. Tr. 170–71. The plant manager said he would get Complainant in for another test. Tr. 171. But that never happened and no one told Complainant why. *Id*. Complainant tried to reapply for other positions at Heinz but was unsuccessful. *Id*. From this, Complainant concluded that: "Something has been put in my background that I'm not being hired and I can't find out what." *Id*.

Americold. Complainant got an interview for a mechanic position with Americold, a refrigeration company associated with Heinz. Tr. 172. Complainant interviewed with Neil Evans, who knew Larry King from their school days. Tr. 172, 386. According to Complainant, "As soon as [Evans] mentioned that they were childhood friends, he says: 'This interview is over, you can go.' And so I got a direct impression that Larry King had cost me that interview." Tr. 172.

Larry King testified that he and Evans were former classmates and had graduated together in 1974. Tr. 386. They saw each other only about once every ten years at class reunions. Tr. 386–87. Larry King never discussed business with Evans and never said anything to Evans about Complainant. Tr. 387. Complainant did not call Evans as a witness or offer any evidence beyond the coincidence in the timing of Evans' remark to dispute Larry King's testimony.[28]

---

[27] On the first page of the job search log, Complainant hand wrote entries into a computer-generated chart. On the next four pages, he listed entries on blank sheets of paper. The entries from the first page, which were made on the computer-generated chart, were duplicated on the next page, which was done on a blank paper. Ignoring that first page, the log contains about 104 entries. C.Ex. L-15.

[28] Larry King testified that he rarely speaks to others about Complainant:

> I try not to have [Complainant] in my personal life. He has agitated and drug me through the coals for so long, I'd rather not think about him very much. And that being said, my personal family, I

Boise Cascade. Complainant received an offer of employment from Boise Cascade. C.Ex. R-4. That offer was later rescinded because Complainant failed a pre-employment background check. C.Ex. R-4. The letter informing Complainant of the rescission states: "This letter is official notification that Boise Cascade is rescinding the offer of employment previously made to you. As discussed, this offer was contingent on successfully passing a pre-employment background check for which the results were unfavorable." C.Ex. R-4. No mention was made of the job offer or the rescission at the hearing, so I have no further information on why Complainant ultimately did not receive the job.

The difficulty with these applications is that Complainant offered no direct evidence of the reasons that he never got hired at either job, and the circumstantial evidence he offered is too scant from which to infer that Larry King was involved. The circumstantial case includes another fact to which Claimant admits and that could readily account for his being rejected for employment at Heinz, Americold, Boise Cascade and other establishments: namely, Complainant was in prison from 1996 until 2002. Tr. 166. Boise Cascade expressly stated that it was not hiring Complainant because he failed the background check; that is consistent with a rejection based on Complainant's criminal record.

Given the six-year incarceration, I infer that Complainant was convicted of a felony. Any employer who conducted a background check might choose not to hire a convicted felon, especially if the conviction was on a crime that would relate to Complainant's job duties in the employment.[29] Truck drivers work much of the day with little or no supervision. They maintain records for which the employer is responsible. These factors could make a variety of felony convictions a consideration for prospective employers, even when the conviction was 16 years earlier.

In addition, the general economy remained relatively weak in 2012, following its very sharp downturn in late 2007 and 2008.

In all, I cannot infer from Complainant's applying for jobs, getting three or four interviews, and then not getting hired, that Larry King was involved or that Complainant's protected activity contributed to anything Larry King said or did with respect to these applications.

There is, however, an exception. Complainant interviewed at NAPA Auto Parts. In his pre-hearing statement, Larry King Enterprises acknowledged that Larry King commented to NAPA about Complainant as follows:

> think [no] one in my personal family actually knows his name, other than [Diane King], other than that, my friends don't know his name, my classmates don't know his name—from me, I've not shared that with anybody. Early on in this investigation, [an OSHA investigator] warned us to keep this mum, and I have, to my best knowledge possible, never divulged his name to anybody else.

Tr. 387–88.

[29] Complainant might have limited the relevance of the conviction had he offered more evidence about the crime to show that it was unrelated to anything that would relate to the jobs for which he was applying. He did not do that.

> [Larry King] received one phone call from NAPA Auto Parts in Ontario, Oregon to which [Complainant] had applied for work. [Larry King] made no derogatory statements about [Complainant] during that conversation. The last question asked of [Larry King] was "Would you hire him again?" [Larry King] answered that question "He left as a disgruntled employee." That ended the conversation.

Respondent's Second Amended Pre-Hearing Statement at 13. NAPA did not offer Complainant a job.

Discussion

The Act provides that a person may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in activity that the Act protects. 49 U.S.C. § 31105(a)(l); 29 C.F.R. § 1978.102(a).[30] The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121, *et seq*.; *see* 49 U.S.C. § 31105(b).

Under AIR-21, a complainant must prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 9 (ARB Jan. 6, 2017). "A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision.'" *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (*en banc*). "'Any' factor really means *any* factor. It need not be 'significant, motivating, substantial or predominant'—it just needs to be *a* factor." *Id.* A complainant may meet this burden with either direct or circumstantial evidence (or both). *See id.* at 54–55; *Powers*, ARB No. 13-034 at 10.

There are "no limitations on the evidence the factfinder may consider" in making the contributory factor determination. *Palmer*, ARB No. 16-035 at 15–16; *Powers*, ARB No. 13-034 at 9. An ALJ may consider evidence of an employer's non-retaliatory reasons for its adverse action in determining the contributing factor question. *Powers*, ARB No. 13-034 at 9 (citing *Palmer*, ARB No. 16-035 at 16). "Thus, '[w]here the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons' along with the employee's evidence to determine whether protected activity was a contributing factor in the adverse action." *Id.* at 9–10 (quoting *Palmer*, ARB No. 16-035 at 16, 58–59). But "[b]ecause the protected activity need

[30] There is no dispute that the Act's protections apply. Complainant meets the whistleblower provision's definition of an employee in that he was at the relevant times a driver of a commercial motor vehicle who directly affected commercial motor vehicle safety in the course of employment by a commercial motor carrier and was not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment. *See* 49 U.S.C. § 31105(j); 29 C.F.R. § 1978.101(h); 49 U.S.C. 31101(1) (defining commercial motor vehicle). Respondent is a "person" and an "employer" within the meaning of the whistleblower provision and its implementing regulations. *See* 29 C.F.R. § 1978.101(i), (k).

only be a 'contributing factor' in the adverse action, an ALJ 'should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons.'" *Id.* at 10 (quoting *Palmer*, ARB No. 16-035 at 16, 58–59). "Since in most cases the employer's theory of the facts will be that the protected activity played *no* role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all." *Palmer*, ARB No. 16-035 at 15.

"If the employee prevails at the first step, the second step under AIR-21 requires the factfinder to determine whether the employer has proven, by clear and convincing evidence, that, 'in the absence of' the protected activity, it would have taken the same adverse action (the 'same-action' defense)."[31] *Powers*, ARB No. 13-034 at 11–12 (quoting *Palmer*, ARB No. 16-035 at 37, 60). "It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Palmer*, ARB No. 16-035 at 57. As at the first step, "the ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action . . . ." *Palmer*, ARB No. 16-035 at 57.

I. Complainant Engaged In Protected Activity.

The Act protects a covered employee's internal complaint to his superiors that the employer is violating a motor vehicle safety regulation if the complaint is based on the employee's reasonable belief. 29 C.F.R. § 1978.102(b)(1); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999 STA 37, slip op. at 6 (ARB Dec. 31, 2002) (citing *Dutkiewicz v. Clean Harbors Environmental Servs., Inc.*, ARB No. 97-090, ALJ No. 95-STA-34, slip op. at 3–4 (ARB Aug. 8, 1997)). Internal complaints may be oral, informal, or unofficial, but to be protected, they must be communicated to management. *Harrison*, *supra*, at 6. The employee need not explicitly mention a commercial vehicle safety standard; the statute requires only that the complaint "relate" to a violation of a commercial motor vehicle safety standard. *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1, slip op. at 4 (Sec'y July 13, 1984).

Two events clearly establish that Complainant engaged in activity protected under the Act. First, September 2011, Complainant asked Larry King to turn down a long-haul run because Complainant could not legally deliver it as scheduled. Second, on or about April 30, 2012, Complainant again raised the ten-hour break requirement with Larry King and described how he could not legally do long-hauls on the schedule Fiberon wanted.

At the hearing, Complainant asserted that the complaints he voiced concern a violation of applicable federal regulations. I find that Complainant's belief was subjectively and objectively reasonable. Applicable regulations provide that an employee may only drive during any period of 14 consecutive hours after taking a 10-hour break and must take another 10-hour break at the conclusion of the 14-hour shift; during the shift, the employee may drive only 11 hours. *See* 49

[31] The "clear and convincing" standard of proof "is usually thought of as the intermediate standard between 'a preponderance' and 'beyond a reasonable doubt'; it requires that the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity." *Palmer*, ARB No. 16-035 at 57. "Quantified, the probabilities might be in the order of above 70% . . . ." *Palmer*, ARB No. 16-035 at 57 (quoting *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978) (Weinstein, J.), *aff'd*, 603 F.2d 1053 (2d Cir.1979)).

C.F.R. 395.3. That is what Complainant was asserting. Although Larry King apparently thought there were some exceptions that might apply, there is no evidence to bring into question that Complainant's belief about a violation was reasonable. His complaints therefore were protected. 49 U.S.C. § 31105(a)(A)(i); 29 C.F.R. § 1978.102(b)(1). His refusal to operate the vehicle on the long-haul jobs as would be required is similarly protected. 49 U.S.C. § 31105(a)(B)(i); 29 C.F.R. § 1978.102(c)(1).

II. Complainant's Protected Activity Was A Contributing Factor To Respondent's Adverse Action.

Respondent took an adverse action against Complainant. It is undisputed that Respondent terminated the employment on June 1, 2012. That is an adverse action within the express list of such actions in the statute. 49 U.S.C. § 31105(a)(A) (discharges among adverse actions prohibited if retaliatory).[32]

I reach an opposite conclusion, however, on Complainant's job search. It is Complainant's burden to establish the adverse action by a preponderance of the evidence, and Complainant falls short of that standard on the facts and the law. Complainant's focus is on the prospective employers who gave him interviews. As discussed above, with the exception of his application to NAPA Auto Parts, I find that Complainant failed to offer sufficient evidence – direct or circumstantial – to demonstrate that Larry King interfered or was in any way involved with Complainant's efforts to get hired after the termination.

Complainant also fails on the law. When it comes to finding replacement employment, what the regulation expressly provides is that persons may not "blacklist" an employee (or former employee) in retaliation for protected activity. 29 C.F.R. § 1978.102(b).[33] In this context, I

[32] Complainant does not really contend and did not establish that Larry King harassed him by somehow being involved in or responsible for the holdups at the Fiberon yard. At the hearing, Complainant testified that he was unsure whether Larry King had anything to do with the holdups. Tr. 185. He was suspicious because the holdups started right after he spoke with Larry King on May 1, 2012. Tr. 185. But Complainant never actually alleged or attempted to prove that Larry King caused, requested, or in any other way instigated the holdups or was involved in the continuation of the holdups once they started. There is no evidence that Larry King had any authority or control over operations at the Fiberon yard. To the contrary, Complainant characterized Fiberon's materials manager Jeffries to be "virtually [Larry King's] boss." Tr. 211. There is no evidence of any communication between Larry King and anyone at Fiberon in which Larry King encouraged or failed to discourage the holdups.

As Complainant testified, the holdups cost Larry King money (even if there was no other work for the truck) because Larry King had to (and did) pay Complainant for the time Complainant spent waiting. Complainant conceded that he personally believed that Larry King did not confront Jeffries about the holdups – and for a time did not ask anyone at Fiberon to help clear a path for the truck – because Larry King feared Jeffries would retaliate, and Larry King needed to protect his main source of income. R.Ex. K at 35. That is also what Larry King testified, explaining that he thought the problem would simply dissipate in time. I accept it as established that was the reason Larry King did not intervene for a while to address the delays. The record evidence does not show that Respondent engaged in an adverse action by any involvement in harassing Complainant in the Fiberon yard.

[33] The regulation provides: "It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or a person acting pursuant to the employee's request has [engaged in protected activity]." 29 C.F.R. § 1978.102(b). Although the language includes the words "or in any other manner retaliate," I do not find that language to expand the prohibition of "blacklisting" into someone broader. If the Secretary addresses activity

understand the regulation to prohibit any person from circulating a name among prospective employers with a suggestion that the former employee should not be hired. At most, Complainant has shown that Larry King made one comment to a prospective employer: NAPA. The comment was that Complainant left the employment as a "disgruntled employee." That is not blacklisting and thus does not violate the regulatory provision.

Moreover, it was not adverse in that it did not disclose that the termination was involuntary (*i.e.*, that Larry King fired Complainant), and it truthfully communicated Larry King's honestly held belief. Larry King testified repeatedly to his observation that Complainant was unhappy with his work and especially with the long-haul drives. I find that, objectively, Complainant was disgruntled when he (1) threatened to complaint to Fiberon headquarters about the conduct of Fiberon's local Idaho managers and then (2) sent the text to Larry King that Larry King reasonably read to mean that – contrary to Larry King's directive – Complainant had actually sent the complaint to Fiberon headquarters.

There is no evidence to suggest that Larry King told NAPA that Complainant was disgruntled without good reason or was in any sense an employee whose conduct, honesty, performance, or other work characteristics were inadequate. I find that Larry King's statement to one prospective employer is not blacklisting and is not sufficiently adverse to be actionable even if the regulation extends to a comment made to a single employer. I therefore reject Complainant's claim to the extent that it is based on Larry King's alleged retaliatory interference with Complainant's job search. But, in the event an appellate body reverses this analysis, I will address this allegation in the alternative below and conclude that Larry King would have made the same comment even had Complainant not engaged in protected activity.

As Complainant has established that Respondent took an adverse employment action when it discharged him, I inquire next whether Complainant's protected activity was a factor that contributed to the discharge.

Complainant's protected activities contributed to the termination. Although the question is close, the broad definition of a contributing factor leads to a finding that Complainant's protected activity contributed to the termination. I conclude that Larry King did not retaliate because of Complainant's protected activity, nor was he motivated to retaliate for that activity. But Complainant's protected activity was a factor in an unbroken chain of events that culminated in the termination.[34] I find that sufficient to establish his protected activity as a factor that contributed to the termination.[35]

---

expressly, I decline to find the "or in any *other* manner" to alter what the expressly stated language addressed (emphasis added).

[34] In the event that, on appeal, it is concluded that Complainant showed Larry King conducted an adverse employment action related to Complainant's job search, I would conclude that Complainant's protected activity contributed to the adverse action in the same manner as it contributed to the termination.

[35] Because Fiberon was dismissed from this case, and was unable to call or cross-examine witnesses at trial, my finding that Fiberon retaliated against Complainant by intentionally holding him up cannot be used against Fiberon in any future proceeding. Binding Fiberon through collateral estoppel would violate Fiberon's right to due process.

A preponderance of the evidence establishes that Fiberon management responded to Larry King Enterprise's refusal of the job on April 30, 2017, by delaying sawdust deliveries Complainant was making at the Fiberon yard. The refusal of the job meant that Fiberon had to contact C.H. Robinson, get another trucking company assigned, and sustain a delay in the delivery of finished goods to a Fiberon customer.

The evidence shows – more likely than not – that Jeffries or others at Fiberon retaliated in kind by delaying Larry King's truck on a number of occasions over the next weeks. The statistics show a sharp increase in delays starting at the beginning of May 2012, especially delays of an hour or more. Fiberon's Van Kleek testified that he would move trucks out of the way well before an hour, and he did move trucks out of Complainant's way on repeated occasions. I have explained why I reject Jeffries' contention that increased activity in the yard explains the delays. When the yard could handle four to six trucks at a time, there should not have been obstacles blocking Complainant as frequently as there were in May 2012 when Fiberon was receiving only five or six trucks in the entire day and a truck could be processed in 20 minutes. Complainant's photographs show an example where a truck blocking his path could readily have been moved out of the way at a time that the yard was not busy, yet he was kept waiting.

Complainant took the delays personally: He thought Fiberon was retaliating because he had refused the job on April 30, 2012. Generally, I am inclined to find that the yard managers at Fiberon were sending a message to Larry King, not Complainant. It makes better business sense that Jeffries would want Larry King to know that they needed these outgoing delivery runs to be completed without delay; it was Larry King who could do something about it. If the evidence had been established that, in his work for Larry King, Scott Hutchens was not delayed in May 2012 when delivering sawdust to Fiberon, I could more readily conclude that Jeffries or some other yard manager at Fiberon also was retaliating (or sending a message) to Complainant, not just to Larry King. But that is not well-established on the record. I can only conclude that Jeffries or some other yard manager wanted Larry King, Complainant, or both of them to know that he didn't like having the outgoing product delayed, and that this manager communicated this by delaying Larry King's truck (that Complainant was driving).

I find no sign in the record that Larry King retaliated against Complainant. Larry King was doubtful about undertaking these long-haul runs. They were outside the niche business that he had developed, and the runs required him to compete against big companies that were better suited to the long-haul deliveries of finished product.

Initially, Complainant appeared willing to drive the long-haul deliveries even if he at times played fast and loose with the same regulations that later led to his complaints and refusal to operate the truck. He did the work without complaint for about a year. When Home Depot started keeping logs of delivery times, Complainant become concerned that his violations might get caught. He refused a job in September 2011, explaining all this to Larry King.

Larry King acquiesced in Complainant's refusal and persuaded Fiberon to reschedule the run so that it could be completed consistent with the regulations. He took no action against Complainant; Complainant remained in Larry King's employ, doing the same work, with no adverse action taken.

The start of log reviews at a state weigh station increased the pressure on Complainant not to violate the regulations. He became concerned about potentially losing his commercial driver's license. He refused a driving assignment on April 30, 2012. Larry King tried to persuade him to understand the regulations differently, but when Complainant would not change his mind, Larry King told Fiberon he would not take the work, and the work went to a different trucking company. Again, there was no adverse action.

After the delays in the Fiberon yard began, Larry King initially did not believe Fiberon was delaying his truck. Even if Jeffries was creating a delay, Larry King's response was to do nothing, hoping that whatever was happening would pass with time. Complainant continued to complain, but Larry King directed him to say nothing to Fiberon; he kept paying Complainant for the time he worked, including any delays in the Fiberon yard. Larry King took no adverse actions. Complainant complied with the instruction not to complain to Fiberon.

Complainant continued to keep Larry King aware of the delays. He would call Larry King and complain. Given Larry King's strategy of laying low and waiting for any problem to pass with time, he had only limited options. His primary response was to ask Complainant to do his job, wait until there was a path to drive the truck and deliver the sawdust, and not dispute with Fiberon managers at the yard. When Complainant began asking Larry King to call Fiberon to ask them to open a path, Larry King made the calls. Fiberon's lead in the yard, Van Kleek, cleared a path on at least one occasion when Larry King called him. It might have been helpful if Larry King could reassign Complainant so that he worked only for customers other than Fiberon, but that was not an option: Fiberon accounted for the vast majority (80 to 90 percent) of the work Larry King did.

But Complainant was not content. He felt that what he believed to be Jeffries' harassment was wrong, both to himself and to Larry King. He was also concerned that eventually the delays would lead to something negative for himself even if Larry King kept telling him not to worry about it and just to wait until a path opened, and even if Larry King kept giving him the same amount of work at the same pay, including pay for the delay time. Larry King knew Complainant was not letting the matter rest: Van Kleek reported that Complainant was taking photos in the yard. Yet, again, Larry King took no action against Complainant; he continued to wait, hoping that the situation would resolve, and continuing to give him the same work at the same pay.

It was only when Complainant first threatened, then wrote to Larry King that he was sending the photos to Fiberon headquarters, that Larry King ended the employment. Only hours before, Larry King had directly told Complainant not to send the photos. Complainant's perception was that Larry King was "freaked out" about the photos and that the one thing Larry King did not want was having them sent to Fiberon's headquarters. But Complainant created the impression that that is exactly what he had done. Even when Larry King told Complainant he'd had enough and was ending the employment, and even assuming that Complainant did not actually send the photos, Complainant did nothing and said nothing to correct the impression that he had sent them.

Short of an act of criminality or violence, it is difficult to imagine what Complainant could have done in this context that more likely would result in a termination of the employment. It was insubordination pure and simple, and Complainant knew Larry King would perceive it as threatening the viability of his business and his livelihood. It was conduct so knowingly insubordinate as to approach an outright quit.

Nonetheless, it remains that the termination culminated a chain of events that included Complainant's refusal to drive the truck. The refusal was protected activity. The protected activity thus played a role in the events that culminated in the termination. "A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision.'" *Palmer, supra.* I therefore conclude that the protected activity was a contributing factor in the termination. But I will also conclude that Larry King would have done the same had Complainant not engaged in protected activity.

III. Respondent Would Have Terminated The Employment Even Absent The Protected Activity.

I have no difficulty finding by clear and convincing evidence that Larry King would have terminated the employment for the same act of insubordination even if Complainant had not engaged in protected activity. Larry King had limited interest in the long-haul jobs. He was already concluding that they would not a good use of his resources, and he stopped taking the runs altogether soon after he terminated Complainant's employment. He asked no more than that Complainant simply wait and say nothing when there was a delay. He assured Complainant that the delays would not affect his employment, and Larry King made no changes to Complainant's terms and conditions of employment on account of the delays or any other reason. As the owner of the business, it was for Larry King to determine how to address the delays if they were happening, and his decision was to let time to pass so that any issue would dissipate. He made no statements to suggest that he in any sense blamed Complainant for the delays, and he took no adverse action even when Van Kleek told him that Complainant was taking photos in the yard. When Complainant asked Larry King to call Fiberon, Larry King called and asked them to clear a path for Complainant to deliver his load of sawdust. Fiberon complied.

I find, by clear and convincing evidence, that what prompted Larry King to terminate the employment was Complainant's knowing act of insubordination, an act that Complainant knew Larry King would understand to threaten his business and his livelihood. Larry King demonstrated repeatedly that his strategy for dealing with Complainant's reports of delays at Fiberon was to wait silently for any problem to dissipate with time. Nothing on the record suggests that Larry King would have taken any action adverse to Complainant had Complainant not been seriously insubordinate. I conclude that – regardless of the background leading up to the termination – Larry King would have terminated the employment for insubordination so extreme as to threaten the business.

I have already found that Larry King's statement to NAPA Auto Parts that Complainant left as a disgruntled employee was not an adverse action within the meaning of the Act. The statement was factually accurate. In many states, employers are successfully bringing actions against

former employers who fail to reveal negative information when giving a job reference.[36] In the one particular reference for which Complainant has evidence, Larry King did not say that he had terminated the employment, he did not suggest that anything was unsatisfactory with Complainant's performance as a driver, and he did not suggest that Complainant had engaged in any conduct that was dishonest, violent, criminal, or in any other way wrongful; indeed, Larry King did not comment on Complainant's performance or conduct on the job at all.[37] In any event, I find by clear and convincing evidence that Larry King told NAPA that Complainant left as a disgruntled employee because that is was Larry King honestly believed, because that is what he would have said regardless of the issues surrounding the long-haul runs, and that Complainant in fact did leave Larry King Enterprises as a disgruntled employee.[38] Thus, even were this an adverse job reference covered by the Act, I conclude by clear and convincing evidence that, absent Complainant's protected activity, Larry King would have given the same job reference.[39]

Because Respondent would have taken the same adverse actions even absent any protected activity, Complainant's claim fails.

Conclusion and Order

For the foregoing reasons, Complainant's claim is DENIED and the case DISMISSED. Complainant's former counsel is entitled to no fees by reason of this action.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of

[36] The cases are characterized as for negligent referral or negligent misrepresent. They appear in many states, including, *e.g.*, New Mexico, Louisiana, and California.

[37] If anything, having a disgruntled employee could be seen as at least as negative about the employer as the employee.

[38] The dictionary defines "disgruntled" as "displeased and discontented; sulky; peevish." DICTIONARY.COM, http://www.dictionary.com/browse/disgruntled?s=t (last visited Jan. 26, 2017). Complainant unquestionably was displeased and discontented at the time of the termination; otherwise, he would never have told Larry King that he was sending the photos to Fiberon headquarters in North Carolina.

[39] Even were there liability on the job reference, Complainant offered no evidence that NAPA would have hired him absent the reference. I therefore could not award economic compensation on this basis.

issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the

petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).